

1 ARIEL E. STERN, ESQ.
 2 Nevada Bar No. 8276
 3 BRETT M. COOMBS, ESQ.
 4 Nevada bar No. 12570
 5 AKERMAN LLP
 6 1160 Town Center Drive, Suite 330
 7 Las Vegas, NV 89144
 8 Telephone: (702) 634-5000
 9 Facsimile: (702) 380-8572
 Email: ariel.stern@akerman.com
 Email: brett.coombs@akerman.com

10
 11 *Attorneys for U.S. Bank, N.A., as Trustee for
 12 the Holders of the WMALT 2006-AR Trust,
 13 Nationstar Mortgage LLC, and Bank of
 14 America, N.A.*

15 **UNITED STATES DISTRICT COURT**

16 **DISTRICT OF NEVADA**

17 U.S. BANK NATIONAL ASSOCIATION, AS
 18 TRUSTEE FOR THE HOLDERS OF THE
 19 WMALT 2006-AR8 TRUST,

20 Plaintiff,
 21 vs.

22 ANTELOPE CANYON HOMEOWNERS
 23 ASSOCIATION; SFR INVESTMENTS POOL
 24 1 LLC; DOE INDIVIDUALS I-X, inclusive, and
 25 ROE CORPORATIONS I-X, inclusive,

26 Defendants.

27 Case No.: 2:15-cv-01423-JCM-PAL

28 **U.S. BANK NATIONAL ASSOCIATION,
 AS TRUSTEE FOR THE HOLDERS OF
 THE WMALT 2006-AR8 TRUST, BANK
 OF AMERICA, N.A. AND NATIONSTAR
 MORTGAGE LLC'S MOTION FOR
 LEAVE TO FILE SUPPLEMENTAL
 BRIEFING IN SUPPORT OF ITS
 MOTION FOR SUMMARY JUDGMENT**

(ECF No. 39)

29 SFR INVESTMENTS POOL 1 LLC, a Nevada
 30 limited liability company,

31 Counter-Claimant,
 32 vs.

33 U.S. BANK NATIONAL ASSOCIATION, AS
 34 TRUSTEE FOR THE HOLDERS OF THE
 35 WMALT 2006-AR8 TRUST; BANK OF
 36 AMERICA, N.A., a national association;
 37 NATIONSTAR MORTGAGE, LLC, a Delaware
 38 limited liability company; WELLS FARGO,
 39 N.A.; and GAIL BUNDY, an individual,

40 Counter-Defendant/Cross-Defendants.

1 ANTELOPE CANYON HOMEOWNERS
 2 ASSOCIATION,

3 Third-Party Plaintiff,

4 v.

5 ALESSI & KOENIG, LLC, A Nevada limited
 6 liability company,

7 Third-Party Defendant.

8 Plaintiff and counter-defendant U.S. Bank National Association, as Trustee for the Holders
 9 of the WMALT 2006-AR8 Trust (**U.S. Bank**) and cross-defendants Bank of America, N.A. (**BANA**)
 10 and Nationstar Mortgage LLC (**Nationstar**) (U.S. Bank, BANA, and Nationstar are collectively
 11 referred to as the **Bank Parties**) respectfully move for leave to submit supplemental briefing to
 12 address the Ninth Circuit's August 12, 2016 opinion in *Bourne Valley v. Wells Fargo Bank, N.A.*, __
 13 F.3d __, No. 15-15223, 2016 WL 4254983 (9th Cir. Aug. 12, 2016) and the Nevada Supreme Court's
 14 August 11, 2016 opinion in *Stone Hollow Avenue Trust v. Bank of America, N.A.*, Case No. 64955,
 15 Slip Op. (Nev. Aug. 11, 2016) (**Exhibit A**) under Local Rule 7-2(g). Good cause exists to grant the
 16 Bank Parties' motion for leave to file supplemental briefing.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I. INTRODUCTION**

19 The Ninth Circuit's *Bourne Valley* decision finds NRS chapter 116's "opt-in" notice scheme
 20 facially unconstitutional under the Fourteenth Amendment's due process clause. The August 12,
 21 2016 ruling alters the landscape in this and hundreds of other quiet title actions arising from pre-
 22 October 1, 2015 assessment lien foreclosure sales.¹ This court should hold the HOA's sale,
 23 conducted under an unconstitutional statute, did not extinguish U.S. Bank's lien.

24 Just a day earlier, the Nevada Supreme Court issued a significant opinion of its own
 25 confirming that BANA's tender of the super-priority portion of Antelope Canyon Homeowners

26 _____
 27 ¹ The Nevada legislature amended NRS chapter 116 effective October 1, 2015 to mandate homeowners' associations
 28 provide mortgagees with notice of default and sale even when notice has not been requested. S.B. 306 (Nev. 2015).

1 Association's (**Antelope Canyon**) lien preserved the priority of the senior deed of trust. In *Stone*
 2 *Hollow*, the court held an offer to pay the full "super priority" lien amount—nine months of unpaid
 3 assessments—extinguishes the "super-priority" lien, *even if the homeowners' association rejects the*
 4 *payment*. The Nevada Supreme Court's ruling in *Stone Hollow* also renders any argument about
 5 SFR being a bona fide purchaser irrelevant, because the tender preserved the senior deed of trust's
 6 priority as a matter of law.

7 The Bank Parties request leave to supplement their motion for summary judgment—in the
 8 manner set forth below—to address the Ninth Circuit and Nevada Supreme Court's new, critical
 9 opinions.

10 **II. BACKGROUND FACTS AND PROCEDURAL HISTORY**

11 U.S. Bank filed this lawsuit seeking a declaration its deed of trust was not extinguished after
 12 Antelope Canyon foreclosed its lien. *See generally* compl., ECF No. 1. U.S. Bank's complaint
 13 asserts the sale violated its right to procedural due process under the Fourteenth Amendment. *Id.* ¶¶
 14 36-46. The complaint requests the court set aside the HOA's sale because NRS chapter 116—as it
 15 existed before its recent amendments—is facially unconstitutional. *Id.*

16 SFR filed counterclaims against U.S. Bank alleging it acquired title to the property free and
 17 clear of the senior deed of trust after Antelope Canyon foreclosed. SFR Invs. Pool 1, LLC's Ans.,
 18 Countercl. & Cross-Claim, ECF No. 11 ¶ 75. SFR named BANA and Nationstar as cross-defendants.
 19 ECF No. 11. BANA was the assignee and servicer of the senior deed of trust at the time Antelope
 20 Canyon purported to foreclose.² Bank Parties' Mot. for Summ. J., ECF No. 39, at 3-5, Ex. 11.

21 The Bank Parties and SFR moved for summary judgment on March 14, 2016. ECF No. 39;
 22 SFR's Mot. for Summ. J., ECF No. 40. SFR responded to the Bank Parties' motion on April 7, 2015.
 23 SFR's resp. in opp'n to the Bank Parties' MSJ, ECF No. 45. Antelope Canyon filed a limited joinder
 24 to SFR's response on April 18, 2016.³ Antelope Canyon's Limited Joinder, ECF No. 46. The Bank

25 _____
 26 ² BANA is the successor by merger to BAC Home Loans Servicing, LP.

27 ³ Antelope Canyon joint in sections III(E)(1) and III(G) of SFR's response to the Bank Parties motion. ECF No. 46.
 These sections are entitled "The Bank's 'Tender' Argument Fails" and "The Sale was Commercially Reasonable."
 ECF No. 45, at 9, 13.

1 Parties responded to SFR's motion on April 22, 2016 and filed a reply in support of their motion for
 2 summary judgment on April 26, 2016. Opp'n to SFR's Mot. for Summ. J., ECF No. 47; Bank
 3 Parties' Reply in Supp. of Mot. for Summ. J., ECF No. 48. SFR filed a reply supporting their motion
 4 for summary judgment on May 9, 2016. SFR's Reply in Supp. of Mot. for Summ. J., ECF No. 49.

5 The Bank Parties moved for summary judgment on the grounds NRS chapter 116, as it
 6 existed at the time of the sale, is facially unconstitutional under the due process clause. ECF No. 39,
 7 at 18-23. The Ninth Circuit entered its opinion in *Bourne Valley* adopting the Bank Parties' position
 8 on August 12, 2016. *Bourne Valley*, 2016 WL 4254983, at *5. The Bank Parties also moved for
 9 summary judgment on the grounds BANA's tender of the super-priority amount redeemed the deed
 10 of trust's first priority position. ECF No. 39, at 16-18. The Nevada Supreme Court adopted this
 11 reasoning on August 11. *See Stone Hollow*, Case No. 64955, Slip Op. (Nev. Aug. 11, 2016).

12 **III. Legal Standard**

13 Local Rule 7-2(g) prohibits supplemental filings without leave of court: "A party may not
 14 file supplemental pleadings, briefs, authorities or evidence without leave of court granted for good
 15 cause." Good cause exists to permit the Bank Parties' request for leave to file supplemental briefing,
 16 set forth below, because the cases referenced below are of major significance to the issues in this
 17 case and had not been decided when the briefing on the parties' respective motions for summary
 18 judgment were filed.

19 **IV. NRS Chapter 116 is Unconstitutional Under Bourne Valley**

20 **A. NRS chapter 116 does not mandate notice to deed of trust beneficiaries**

21 The due process clause requires, "at a minimum, [the] deprivation of life, liberty, or property
 22 by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the
 23 case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). An "elementary and
 24 fundamental requirement" is "notice reasonably calculated, under all circumstances, to apprise
 25 interested parties of the pendency of the action and afford them an opportunity to present their
 26 objections." *Tulsa Prof'l Collection Services, Inc. v. Pope*, 458 U.S. 478, 484 (1988) (quoting
 27 *Mullane*, 339 U.S. at 314) (emphasis added)).

1 NRS chapter 116 did not mandate notice to mortgagees prior to its recent amendments—as
 2 the Bank Parties argued in its prior briefing. ECF No. 39, at 19–21. The statutory scheme contained
 3 "request-notice" or "opt-in" notice provisions, requiring notice *only* if lienholders requested it in
 4 advance. *See e.g.*, NRS 116.31163(2) (requiring notice of default to "any holder of a security
 5 interest encumbering the unit owner's interest *who has notified the association*, 30 days before the
 6 recordation of the notice of default, of the security interest.") (emphasis added.); NRS 116.311635
 7 (requiring notice of sale to "[t]he holder of a recorded security interest or the purchaser of the unit, *if*
 8 *either of them has notified the association*, before the mailing of the notice of sale, of the existence
 9 of the security interest, lease or contract of sale, as applicable.") (emphasis added.)

10 As the Ninth Circuit explained, NRS chapter 116 "required a homeowners' association to
 11 alert a mortgage lender it intended to foreclose only if the lender had affirmatively requested
 12 notice."⁴ *Bourne Valley*, 2016 WL 4254983, at *1. The Ninth Circuit befittingly described chapter
 13 116's "opt-in" notice scheme's practical effect:

14 Despite that only the homeowners' association knew when and to what extent a
 15 homeowner had defaulted on her dues, the burden was on the mortgage lender to
 16 ask the homeowners' association to please keep it in the loop regarding the
 17 homeowners' association's foreclosure plans. How the mortgage lender, which
 18 likely had no relationship with the homeowners' association, should have known to
 19 ask is anybody's guess.

20 *Bourne Valley*, 2016 WL 4254983, at *3.

21 *Bourne Valley* holds—as an issue of first impression—NRS chapter 116's "peculiar
 22 scheme" is facially unconstitutional under the Fourteenth Amendment. *Id.* at *3. Plaintiff Bourne
 23 Valley Court Trust obtained a quitclaim deed to a reverted property following an HOA's foreclosure
 24 sale. *Id.* at *1–2. It then filed suit to quiet title against the senior mortgagee. *Id.* The district court
 25 granted summary judgment to Bourne Valley Court Trust, holding the HOA's sale extinguished the
 26 lender's interest under *SFR Invs.* *Id.* On appeal, the Ninth Circuit found NRS chapter 116's "opt-in"

27

⁴ The Nevada Supreme Court also made clear NRS chapter 116 is an "opt-in" notice statute in *SFR Investments*: "Before
 28 [foreclosure], the HOA must give notice of sale to the owner and to the holder of a recorded security interest *if* the
 security interest holder 'has notified the association, before mailing of the notice of sale of the existence of the security
 interest.'" *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 411 (Nev. 2014) (emphasis added) (citing
 NRS 116.311635(1)(b)(2)).

1 notice scheme "not only strange [but] also unconstitutional" because it "required a homeowners'
 2 association to alert a mortgage lender that it intended to foreclose only if the lender had affirmatively
 3 requested notice." *Id.* at *3, *1.

4 In the absence of controlling authority analyzing the constitutionality of an "opt-in" notice
 5 scheme, the Ninth Circuit turned to the Fifth Circuit, who evaluated a similar clause in the context of
 6 Louisiana's foreclosure statute.⁵ *Id.* at *4. In *Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883 (5th
 7 Cir. 1989), the Fifth Circuit held the Louisiana statute—which mandated prior notice of seizure only
 8 to those who requested it—did not pass constitutional muster because it impermissibly shifted the
 9 "entire burden of ensuring adequate notice to an interested party regardless of the circumstances."
 10 *Id.* at 884 (citing *Mennonite*, 462 U.S. at 797).

11 *Bourne Valley* analogized NRS chapter 116's "opt-in" notice provisions to those in the
 12 unconstitutional Louisiana statute, finding NRS chapter 116 similarly impermissibly shifts the
 13 burden of ensuring adequate notice to mortgage lenders without regard for (1) whether the mortgage
 14 lender was aware that the homeowner had defaulted on her dues to the homeowners' association, (2)
 15 whether the mortgage lender's interest had been recorded such that it would have been easily
 16 discoverable through a title search, or (3) whether the homeowners' association had made any effort
 17 whatsoever to contact the mortgage lender. *Id.* at *4.

18 *Bourne Valley* rejects the argument NRS 107.090—governing notice required for default
 19 and sale under a deed of trust—cures NRS chapter 116's deficiencies. *Id.* *Bourne Valley* argued
 20 NRS 107.090's notice requirements "should be read into" chapter 116 via NRS 116.31168(1), under
 21 which "[t]he provisions of NRS 107.090 apply to the foreclosure of [a homeowners' association's
 22 lien as if a deed of trust were being foreclosed." *Id.* The Ninth Circuit disagreed, noting *Bourne*

23 _____
 24 ⁵ The Nevada Supreme Court did not decide the constitutionality of NRS chapter 116 in *SFR Investments*. See
 25 *SFR Investments*, 334 P.3d at 418. That mortgagee made an *as-applied*, rather than *facial* challenge to NRS chapter 116,
 26 arguing it received insufficient notice under the due process clause. See *id.* The Nevada Supreme Court did not reach
 27 the *as-applied* challenge because "at the pleadings stage, we credit the allegations of the complaint that [the HOA]
 provided all statutorily required notices as true and sufficient to withstand a motion to dismiss." *Id.* There was no
 consideration of the argument NRS is facially unconstitutional because it impermissibly requires mortgagees to opt-in to
 their due process rights. *SFR Investments* has no precedential value in deciding the *facial* unconstitutionality issue
 presented here.

1 Valley's statutory interpretation renders chapter 116's notice provisions entirely superfluous. *Id.*
 2 The court also noted the legislature would have had no reason to amend NRS chapter 116—as it did
 3 last year—if the statute already required notice to mortgagees whose interests may be extinguished.
 4 *Id.* at *4 n.4.

5 **B. Bourne Valley holds the state actor requirement is satisfied**

6 *Bourne Valley* confirms the potential extinguishment of a deed of trust amounts to state
 7 action. *Id.* at *5. "State action" requires a constitutional deprivation by the exercise of a right or
 8 privilege created by the state or by a person from whom the state is responsible, by someone fairly
 9 characterized as a "state actor." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (internal
 10 quotations and citation omitted). Under *Bourne Valley*, the state action requirement is satisfied for
 11 two reasons.

12 *First*, the court explained a homeowners' association's foreclosure would not extinguish a
 13 lender's interest absent chapter 116's "peculiar" statutory scheme. *Bourne Valley*, at *3. The
 14 statute's enactment had the effect of rendering the first deed of trust holder's interest unsecured
 15 because "if a homeowners' association foreclosed on a lien for unpaid assessments, [the lender]
 16 would forfeit all of its rights in the property." *Id.* at *5.

17 *Second*, the court noted homeowners' associations and lenders do not have a preexisting
 18 relationship, contractual or otherwise—and thus a homeowners' association's ability to extinguish a
 19 lender's lien "arose directly and exclusively" from NRS chapter 116. *Id.* To this end, the court
 20 rejected Bourne Valley Court Trust's reliance on *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149
 21 (1978) and *Charmicor, Inc. v. Deaner*, 572 F.2d 694 (9th Cir. 1978)—two cases foreclosure buyers
 22 commonly cite. *Id.* The court found both distinguishable because the parties had a debtor-creditor
 23 relationship in those cases, unlike homeowners' associations and mortgagees who "may not even be
 24 aware of each other's existence." *Id.*

25 **C. Any alleged factual issue concerning actual notice is irrelevant**

26 Whether the Bank Parties had actual notice of the "super-priority" lien amount is irrelevant.
 27 An unconstitutional law is void. *Journigan v. Duffy*, 552 F.2d 283, 289 (9th Cir. 1977).

1 Consequently, a successful facial challenge invalidates the statute itself. *Foti v. City of Menlo Park*,
 2 146 F.3d 629, 635 (9th Cir. 1998); *Dehne v. Avanino*, 219 F. Supp. 2d 1096, 1102 (D. Nev. 2001).
 3 Actual notice does not change the analysis. *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 456 (1st Cir.
 4 2009).⁶ *Bourne Valley* itself recognized Wells Fargo's failure to "present evidence that it did not
 5 receive notice" did not affect its facial challenge. *See Bourne Valley*, No. 15-15233, at 7.⁷ The
 6 statute is facially unconstitutional and therefore void as a matter of law.

7 **V. BANA'S TENDER DISCHARGED THE "SUPER-PRIORITY" LIEN UNDER STONE HOLLOW**
 8 **AND RENDERS SFR'S BONA FIDE PURCHASER ARGUMENT IRRELEVANT.**

9 On August 11, 2016, the Nevada Supreme Court held an offer to pay the "super-priority"
 10 amount prior to the sale preserves the lender's deed of trust, *even if the homeowners association*
 11 *refuses to accept payment*. *Stone Hollow*, No. 64955, Slip. Op. at *1 (emphasis added) (Ex. A).
 12 This ruling closely follows the court confirming a "super-priority" lien, prior to the October 1, 2015
 13 amendments, is nine months of common assessments—and not a penny more. *See Horizon at Seven*
 14 *Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 373 P.3d 66, 72 (Nev. 2016). *Ikon Holdings*
 15 specifically holds the "super-priority" lien granted by NRS 116.31162(2) "is limited to an amount
 16 equal to the common expense assessments due during the nine months before foreclosure." *Id.* The
 17 *Stone Hollow* decision likewise renders SFR's bona fide purchaser argument irrelevant.

18 *Stone Hollow* confirms an offer to pay the "super-priority" amount redeems the first deed of
 19 trust's priority even if the offer is rejected. Plaintiff *Stone Hollow* purchased the property at a
 20 homeowners' association's sale then filed suit against the mortgagee to quiet title in *Stone Hollow*.
 21 *See Stone Hollow Avenue Trust v. Bank of Am., N.A.*, No. 64955, 2016 WL 1109167, at *1 (Nev.
 22 Mar. 18, 2016) (unpublished disposition). The trial court entered summary judgment in favor of the
 23 mortgagee. *Id.* at *1. *Stone Hollow* appealed. *Id.* On appeal, the court (in March 2016) reversed,

24 ⁶ *See also Planned Parenthood v. Casey*, 505 U.S. 833, 894 (1992) (holding spousal abortion notification law
 25 unconstitutional notwithstanding some women would voluntarily notify their husbands).

26 ⁷ The Ninth Circuit has consistently rejected the argument an actor might voluntarily provide more process than the
 27 statute provides. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 789 (9th Cir. 2014) (where statute failed to provide for
 individualized determination before setting bail, declining to consider whether officials might decide to provide such
 determination voluntarily and holding entire statute unconstitutional).

1 finding the trial court failed to consider Stone Hollow's *bona fide* purchaser status. *Id.*, at *1. The
 2 mortgagee moved for rehearing on the grounds tender discharges the super-priority lien legally,
 3 rendering equitable doctrines inapplicable. The three-judge panel agreed—reversing its prior ruling.
 4 *Stone Hollow Avenue Trust v. Bank of Am., N.A.*, No. 64955, Slip. Op. at 2 (Ex. A). The court found
 5 the homeowner's association's rejection of the proffer of the full super-priority lien amount
 6 "unjustified" and "[w]hen rejection of a tender is unjustified, the tender is effective to discharge the
 7 lien." *Id.* at 1.

8 Although unpublished, *Stone Hollow* is persuasive, especially considering all panel members
 9 were in the *SFR Investments* majority. *See id.* at 2; *SFR Invs.*, 334 P.3d at 419; *see also Fernando v.*
 10 *MortgageIT*, No. 2:11-CV-1352-JCM-GWF, 2012 WL 1586015, at *2 (D. Nev. 2012)
 11 (unpublished). *Stone Hollow* also accords with both *SFR Investments*. and the Nevada Real Estate
 12 Division (**NRED**)'s December 12, 2012 opinion. The *SFR Investments* court noted:

13 As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces,
 14 a superpriority piece and a subpriority piece. The superpriority piece, consisting of
 15 the last nine months of unpaid HOA dues and maintenance and nuisance-abatement
 charges, is "prior to" a first deed of trust. *The subpriority piece, consisting of all
 other HOA fees or assessments, is subordinate to a first deed of trust.*

16 *SFR Invs.*, 334 P.3d at 411 (emphasis added). The court acknowledged a lender may preserve its
 17 interest by tending "the precise super priority amount" in advance of the sale. *Id.* at 418. NRED
 18 agrees. *See* December 12, 2012 NRED Advisory Opinion No. 13-01, at 11; *see also*
 19 NRS 107.080(2)(a) (preventing a foreclosure on a first deed of trust until junior lienholders are
 20 provided notice and an opportunity to pay the prior lien).

21 The common law definition of tender is "an offer of payment that is coupled either with no
 22 conditions or only with conditions upon which the tendering party has a right to insist." *Fresk v.*
 23 *Kraemer*, 99 P.3d 282, 286-287 (Or. 2004); *see also* 74 Am. Jur. 2d *Tender* §22 (2014). The
 24 Uniform Common Interest Ownership Act's (**UCIOA**) drafters described the act of tender in
 25 comment 1 to 3-116. The comment 1 of 3-116 of UCIOA (**UCIOA**) provides that "[a]s a practical
 26 matter, secured lenders will most likely pay the [nine] months assessments demanded by the
 27 association rather than having the association foreclose on the unit." 1982 UCIOA § 3116 cmt. 1

1 (cited with approval in *SFR Investments*, 334 P.3d at 414).⁸ Thus, UCIOA's authors envisioned that
 2 only a payment of the super priority amount was necessary to redeem the lender's priority. That is
 3 exactly what BANA offered to do.

4 BANA did exactly what Nevada law requires to protect its lien priority. Alessi & Koenig,
 5 LLC (**Alessi**), Antelope Canyon's trustee, provided BANA a payoff statement detailing the monthly
 6 common assessments on or around April 12, 2011. ECF No. 39, Ex. 11-2, at 9. BANA tendered a
 7 check to Alessi in the amount of \$1,440.00. *Id.* at 17. Alessi, on behalf of Antelope Canyon,
 8 rejected the tender. *Id.* at 20. Antelope Canyon and Alessi's rejection is immaterial. The tender
 9 alone preserves the priority of the senior deed of trust. *See* No. 64955, Slip. Op. (Ex. A).

10 BANA's tender also renders SFR's argument regarding its purported status as a *bona fide*
 11 purchaser irrelevant. ECF No. 40, at 17-18; ECF No. 45, at 14-15. In its own motion, SFR argued
 12 that it is entitled to bona fide purchaser status by doing nothing to confirm the HOA foreclosure
 13 included a super-priority lien and by assuming the foreclosure was done properly. ECF No. 40, at
 14 17-18. Thus, despite SFR's knowledge of the senior recorded security interest and SFR's acquisition
 15 of 650 other similar Nevada properties as a high-risk litigation-based investment strategy, SFR
 16 contends it is entitled to protection as an innocent purchaser who took title without notice of the facts
 17 underlying this dispute. *See* ECF No. 39, at 10 (discussing SFR's bulk acquisition of this and 17
 18 other properties).

19 However, as noted above, the *Stone Hollow* opinion demonstrates that BANA's tender of the
 20 super-priority portion of the statutory HOA lien satisfied that portion of the lien **as a matter of law**.
 21 In *Stone Hollow*, the Nevada Supreme Court first reversed the district court's award of summary
 22 judgment in the lender's favor based on the purchaser's argument that it should be considered a *bona*
 23 *fide* purchaser for value. *Stone Hollow*, 2016 WL 1109176, *1. On reconsideration, however, the
 24 Supreme Court reversed itself and affirmed the district court's judgment based on BANA's tender of
 25

26 ⁸ The Nevada Supreme Court cited to the official comments to UCIOA extensively when evaluating the HOA Lien
 27 Statute in *SFR Investments*, 334 P.3d at 412 ("An official comment written by the drafters of a statute and available to
 the legislature before the statute is enacted has considerable weight as an aid to statutory construction.").

1 the full super-priority portion of the statutory HOA lien, finding the association's rejection of the
 2 tender "unjustified" and that "[w]hen rejection of a tender is unjustified, the tender is effective to
 3 discharge the lien." *Stone Hollow*, No. 64955, Slip. Op. (Ex. A). A valid tender of the super-priority
 4 therefore renders any claim by SFR to be a bona fide purchaser immaterial.

5 BANA did exactly what Nevada law requires to protect its lien priority.

6 **VI. CONCLUSION**

7 Good cause exists to grant the Bank Parties's motion for leave to file supplemental briefing.
 8 *Bourne Valley* requires entry of a declaration SFR's interest in the property, if any, is subject to U.S.
 9 Bank's interest.

10 Alternatively, the court should enter summary judgment for the Bank Parties because, under
 11 *Stone Hollow*, tender is all Nevada law requires to extinguish a homeowners' association's super-
 12 priority lien.

13 Respectfully submitted, this 1st day of September, 2016.

14 **AKERMAN LLP**

15 /s/ Brett M. Coombs

16 ARIEL E. STERN, ESQ.

17 Nevada Bar No. 8276

18 BRETT M. COOMBS, ESQ.

19 Nevada Bar No. 12570

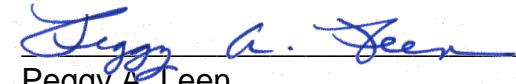
20 1160 Town Center Drive, Suite 330

21 Las Vegas, Nevada 89144

22
 23 *Attorneys for U.S. Bank, N.A., as Trustee for the*
 24 *Holders of the WMALT 2006-AR Trust, Nationstar*
 25 *Mortgage LLC, and Bank of America, N.A.*

26
 27 **IT IS ORDERED** that the Motion for Leave to File Supplemental Brief is **GRANTED**. Bank
 28 parties shall have until 9/20/2016 to file a supplemental brief not to exceed 10 pages limited to the
 two recent decisions mentioned in the motion. Defendants shall have until 9/27/2016 to file a
 response not to exceed 10 pages. No reply shall be allowed.

29 Dated this 14th day of September, 2016.


 30 Peggy A. Leen
 31 United States Magistrate Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 1st day of September, 2016 and pursuant to FRCP 5(b), I caused to be served a true and correct copy of the foregoing **U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF THE WMALT 2006-AR8 TRUST, BANK OF AMERICA, N.A. AND NATIONSTAR MORTGAGE LLC'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFING IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**, through this Court's CM/ECF electronic filing system to the following parties:

Diana S. Cline, Esq.
Jacqueline A. Gilbert, Esq.
KIM GILBERT EBRON
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Email: diana@kgelegal.com
Email: jackie@kgelegal.com

Attorneys for SFR Investments Pool 1, LLC

Steven T. Loizzi, Jr., Esq.
ALESSI & KOENIG, LLC
9500 West Flamingo Road, Suite 205
Las Vegas, Nevada 89147-5721
Email: steve@alessikoenig.com

Attorney for Alessi & Koenig, LLC

James W. Pengilly, Esq.
Elizabeth B. Lowell, Esq.
PENGILLY ROBBINS
1995 Village Center Circle, Suite 190
Las Vegas, Nevada 89134-0562
Email: jpengilly@pengillylawfirm.com

Attorneys for Antelope Canyon Homeowners Association

/s/ Josephine Washenko

An employee of AKERMAN LLP

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INDEX OF EXHIBITS TO
U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF
THE WMALT 2006-AR8 TRUST, BANK OF AMERICA, N.A. AND NATIONSTAR
MORTGAGE LLC'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL
BRIEFING IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Case No.: 2:15-cv-01423-JCM-PAL

Exhibit A: *Stone Hollow Avenue Trust v. Bank of America, N.A.*, Case No. 64955,
Slip Op. (Nev. Aug. 11, 2016)

EXHIBIT A

STONE HOLLOW A VENUE TRUST

V.

BANK OF AMERICA, N.A.,
CASE NO. 64955, SLIP OP.
(NEV. AUG. 11, 2016)

IN THE SUPREME COURT OF THE STATE OF NEVADA

STONE HOLLOW AVENUE TRUST,
Appellant,
vs.
BANK OF AMERICA, NATIONAL
ASSOCIATION,
Respondent.

No. 64955

FILED

AUG 11 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY DEPUTY CLERK
[Signature]

***ORDER GRANTING PETITION FOR REHEARING,
VACATING PRIOR ORDER, AND AFFIRMING***

Having considered the petition for rehearing and answer to the petition, we have determined that rehearing of this matter is warranted, as this court gave undue significance to the fact that respondent's \$198 tender was rejected by Heritage Estates Homeowners Association. *See* NRAP 40(c)(2)(A). Specifically, because appellant did not dispute that \$198 was adequate to pay off the superpriority portion of Heritage Estates' lien, it follows that Heritage Estates was unjustified in rejecting respondent's tender of that amount.¹ When rejection of a tender is unjustified, the tender is effective to discharge the lien. *See, e.g., Hohn v. Morrison*, 870 P.2d 513, 516-17 (Colo. App. 1993); *Lanier v. Mandeville Mills*, 189 S.E. 532, 534-35 (Ga. 1937); *Fed. Disc. Corp. v. Rush*, 257 N.W. 897, 899 (Mich. 1934); *Segars v. Classen Garage & Serv. Co.*, 612 P.2d 293, 295-96 (Okla. Civ. App. 1980); *Reynolds v. Price*, 71 S.E. 51, 53 (S.C. 1911);

¹Appellant argues in its answer to the rehearing petition that Heritage Estates was justified in rejecting the tender because respondent made the tender conditional. We decline to consider this argument because it was not raised either in district court or on appeal.

Karnes v. Barton, 272 S.W. 317, 319 (Tex. Civ. App. 1925); *Hilmes v. Moon*, 11 P.2d 253, 260 (Wash. 1932); *see also* 59 C.J.S. *Mortgages* § 582 (2016).

Therefore, at the time of Heritage Estates' foreclosure sale, the superpriority portion of Heritage Estates' lien had been discharged, leaving only the subpriority portion of the lien to be foreclosed. Because respondent's deed of trust was superior to that portion of Heritage Estates' lien, the deed of trust was not extinguished by virtue of the sale to appellant. Accordingly, the district court correctly determined as a matter of law that appellant took title to the property subject to respondent's deed of trust. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (reviewing a district court's summary judgment *de novo*). We therefore vacate our March 18, 2016, disposition and in its place enter this order affirming the district court's summary judgment.

It is so ORDERED.

Hardesty, J.
Hardesty

Saitta, J.
Saitta

Pickering, J.
Pickering

cc: Eighth Judicial District Court Dept. 29
Kerry P. Faughnan
Greene Infuso, LLP
Akerman LLP/Las Vegas
Eighth District Court Clerk